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Enhanced subsidiarity and a dialogic approach - or appeasement in recent cases at Strasbourg against the UK?

Professor Helen Fenwick

Introduction

This chapter is written against a back-drop of rising hostility to the ECHR in an increasingly nationalistic Britain which is currently confronting the threat represented by Russian action in Ukraine and the threat of ISIS expansion in Iraq and Syria. In that context, at present, the defence of British national sovereignty against encroaching European power so that government can take necessary measures to protect the public commends itself with particular force to some Parliamentarians, much of the media, and parts of the population.¹

This chapter considers the devices, including the principle of subsidiarity, and the notion of dialogue with domestic courts, that the Strasbourg Court is increasingly under pressure to employ in order to avoid head-on clashes with Britain in relation to especially sensitive issues. The discussion will be placed in the context of the Interlaken and Brighton declarations leading to Protocols 15 and 16 with a view to considering whether, or how far, the notion of ‘enhanced subsidiarity’, which underpins those declarations, is having an impact on some recent Court judgments, especially in the counter-terror context, as an example of an especially sensitive area of Strasbourg jurisprudence.

The prisoners’ voting rights saga, dealt with elsewhere in this book,² obviously provides a further currently highly significant example of the existence of strong tensions between the UK and the Strasbourg Court. It can be asked whether the decision in *Hirst v UK*³ represents a failure of the dialogic approach, bearing in mind that emphasis on both dialogue and enhanced subsidiarity were less apparent at the time of that decision. A similar stand-off might be avoided in future if both dialogue and subsidiarity are now receiving greater emphasis at Strasbourg and domestically. Such emphasis might perhaps have been anticipated in that context, given the exceptionally qualified nature of Protocol 1 Article 3,

¹ See the Daily Mail’s report (25.9.14) on Cameron’s stance on the HRA in relation to ISIS fighters returning from Syria or Iraq: ‘Foreign terrorists will be free to come to Britain safe in the knowledge that they will never be sent home unless the Human Rights Act is scrapped, David Cameron has warned... The Tory leader dismissed criticism of his plans to replace Labour’s controversial legislation with a new Bill of Rights, the first in British law for more than 300 years. Mr Cameron said the Act was ‘practically an invitation for terrorists and would-be terrorists to come to Britain’... He also rejected calls to pull Britain out of the European Convention on Human Rights (ECHR) altogether.... The best option, he said, was for new British legislation clearly setting out people’s rights while strengthening the hand of the authorities in the fight against crime and terrorism.’ <http://www.dailymail.co.uk/news/article-392385/Cameron-terror-warning-Human-Rights-Act.html#ixzz3EJo9kRZH>. (Cameron’s speech – his strongest attack on the HRA to date - was to the centre-right think tank the Centre for Policy Studies). See also for example Cameron’s attack on the HRA in relation to the August 2011 riots (speech to House of Commons 11.8.11; speech to his constituency, 15.8.11). Theresa May has announced the Conservative Party’s willingness to repeal the HRA and consider withdrawal from the ECHR over legal disputes connected with terrorism and prisoner’s voting (A Travis ‘Conservatives promise to scrap the Human Rights Act after next election’ *the Guardian* 30th September 2013; see at <http://www.theguardian.com/law/2013/sep/30/conservatives-scrap-human-rights-act>). YouGov polling for the *Sunday Times* 20.7.14 on the ECHR found that the British public is divided on the question of whether the UK should stay in (38%) or withdraw from the Convention (41%). A yougov poll on 26.8.11 found: 75% of British people think that the Human Rights Act ‘is used too widely to create rights that it was never intended to protect’.

² See Chap 00.

³ *Hirst v UK* (2004) 38 EHRR 825.

the broad exceptions to the right accepted by the Strasbourg Court, its relativistic approach to it, and the lack of consensus on this matter in the various member states. The findings in *Scoppola*⁴ and recently in *Firth*⁵ arguably represent attempts at compromise and at repairing relations with the British government, which in this instance may be too late.⁶

A number of judges have recently expressed their preference for viewing the interaction between Strasbourg and the UK courts as a dialogue within which both parties seek to find an acceptable balance between the rights of the applicants and countervailing considerations (in particular, Lord Neuberger,⁷ and Baroness Hale,⁸ Sir Nicholas Bratza).⁹ But if *domestic* courts are prepared to show deference to state arguments in the counter-terror context, might a dialogic approach at the international level, especially bearing the margin of appreciation doctrine in mind, result in according the state a double dose of deference?

This chapter will suggest that enhanced subsidiarity combined with a form of ‘dialogic’ approach has shown some potential to lead to introducing proportionality or contextually-based exceptions or diluting recalibrations into non-materially qualified or absolute rights, in particular Articles 5 and 3. The chapter will ask whether, especially in the light of the emphasis on giving greater prominence to the principle of subsidiarity in its judgments, dialogue has at times given way to mere appeasement of the government. In other words, is the Court tending to revisit the ‘true’ scope of the ECHR in a more deferential spirit, especially in relation to the UK? If so, is that an almost inevitable and possibly welcome development when the relationship between the UK government and at the Court is in greater jeopardy¹⁰ (in the view of this author) than at any time since the inception of the ECHR?

Reform of the Strasbourg Court via ‘enhanced subsidiarity’

This chapter will not discuss moves towards ‘reform’ of the ECtHR, resulting in Protocols 15 and 16, in any detail.¹¹ The idea that a *greater* emphasis on subsidiarity should form an aspect of reform of the Court system gained purchase within the Interlaken declaration in 2010, which was focused on creating enhanced subsidiarity. The Interlaken Declaration stated: ‘The Conference, acknowledging the responsibility shared between the States Parties and the Court, invites the Court to ... take fully into account its subsidiary role in the interpretation and application of the Convention...[and] invites the Court to... avoid reconsidering questions of fact or national law that have been considered and decided by national authorities, in line with its case law according to which it is not a fourth instance court’.¹² The Interlaken follow-up focussed solely on the principle of subsidiarity, finding that the form of subsidiarity at issue – so-called ‘complementary subsidiarity’ – meant that: ‘the Court’s powers of

⁴ *Scoppola v Italy* (no. 3) (App no 126/05), judgment of 22nd May 2012.

⁵ *Firth v UK* (App nos 44784/09 etc), judgment of 14th August 2014.

⁶ See further H Fenwick, ‘Prisoners’ Voting Rights, Subsidiarity, and Protocols 15 and 16: Re-creating Dialogue With the Strasbourg Court?’ UK Const. L. Blog (26th November 2013) (available at <http://ukconstitutionallaw.org>).

⁷ O Bowcott ‘Senior judge warns over deportation of terror suspects to torture states’ *the Guardian* 5th March 2013; see at <http://www.theguardian.com/law/2013/mar/05/lord-neuberger-deportation-terror-suspects>.

⁸ B Hale ‘*Argentoratium Locutum*: Is Strasbourg or the Supreme Court Supreme?’ (2012) 12(1) HRLR 65-78.

⁹ O Bowcott ‘Sir Nicolas Bratza defends the European Court of Human Rights’ *the Guardian* 21st October 2012.

¹⁰ See Theresa May’s proposals to consider withdrawal from the ECHR if the Conservatives win the 2015 election: A Travis ‘Conservatives promise to scrap the Human Rights Act after next election’ *the Guardian* 30th September 2013; see at <http://www.theguardian.com/law/2013/sep/30/conservatives-scrap-human-rights-act>. But see Cameron’s current view on withdrawal in Sept 2014 : note 1 above.

¹¹ They are discussed elsewhere in this book; see Chap 00.

¹² Point 9.

intervention are confined to those cases where the domestic institutions are incapable of ensuring effective protection of the rights guaranteed by the Convention'.¹³

Britain's recent Chairmanship of the Council of Europe¹⁴ obviously provided the Conservative leadership with an opportunity to present proposals intended to allow the current use of the margin of appreciation doctrine to be taken much further, creating greater subsidiarity.¹⁵ The government's plans for reform of the Court were extensively trailed in the run up to the Brighton Conference in April 2012. In similar vein, intervening in *Scoppola v. Italy No 3*,¹⁶ the (then) UK Attorney General Dominic Grieve said that greater acknowledgment of the doctrine of the margin of appreciation would result in the ECtHR intervening only when 'the decision of the national authorities is manifestly without reasonable foundation'.

David Cameron's speech to the Parliamentary Assembly of the Council of Europe in 2012,¹⁷ reiterated the theme of seeking enhanced subsidiarity as a key reform. He referenced counter-terrorism and prisoners' voting rights as examples of issues on which the Court should be very slow to intervene, once democratic debate on the issue and full scrutiny in national courts, taking the Convention into account, had occurred. Referencing the *Qatada*¹⁸ case as illustrating the need for reform, he said 'we have gone through all reasonable national processes...yet we are still unable to deport [or detain] him.

A draft declaration for that conference was 'leaked',¹⁹ which gave much greater prominence to the principle of subsidiarity than the eventual Brighton declaration itself did.²⁰ The leaked proposals stated that the principle should be *enhanced* by its express inclusion in the Convention itself. The declaration emphasised subsidiarity to an extent – but not as far as the Conservative leadership had wanted:

'The Conference a) welcomes the development by the Court in its case law of principles such as subsidiarity and the margin of appreciation, and encourages the Court to give great prominence to and apply consistently these principles in its judgments...and (b) Concludes that... a reference to the principle of subsidiarity and the doctrine of the margin of appreciation as developed in the Court's case law should be included in the *preamble* to the Convention'.²¹ That aspect of the declaration was then captured in Protocol 15 Article 1. The

¹³ Interlaken Declaration, 19.02.2010; see at

<http://www.echr.coe.int/ECHR/EN/Header/The+Court/Reform+of+the+Court/Conferences/>. Note by the Jurisconsult *Principle of subsidiarity*.

¹⁴ It began on 07.11.2011.

¹⁵ According to Parliamentary written answers and statements: M Harper, HC Deb Vol 525 Col 31WS, 18th March 2011: '...we will be pressing...to reinforce the principle that states rather than the [Court] have the primary responsibility for protecting Convention rights'.

¹⁶ App no 126/05; judgment of 22nd May 2012.

¹⁷ N Watt 'David Cameron Calls for Reform of ECHR' *the Guardian*, 25th January 2012; see at <http://www.theguardian.com/law/2012/jan/25/david-cameron-reform-european-court>.

¹⁸ *Othman v UK* (App no 8139/09) judgment of 17th January 2012.

¹⁹ On 23.02.2012.

²⁰ Point 23(b) of the leaked document on options for amending the admissibility criteria had proposed controversially that an application should be declared inadmissible if it was the same in substance as a matter that has already been determined by the national courts *unless* the Court considered that the national court 'clearly erred in its application or interpretation of the Convention rights'. But that proposal did not make its way into the final declaration.

²¹ Point 12. The leaked proposals stated that the principles should be *enhanced* by their express inclusion in the Convention itself.

Brighton declaration also emphasised the need for the use of dialogue: it further ‘welcomes and encourages dialogue, particularly dialogues between the Court and the highest courts of the States Parties’.²²

Subsidiarity is linked to a dialogic approach in the sense that if the Strasbourg Court perceives itself as providing a level of protection of rights that is subsidiary to that provided domestically, then it needs to pay close attention to national views as to the form of protection that the right should receive nationally and to their context, especially where such views demonstrably take account of key Convention principles at stake in the particular instance, such as that of proportionality. Protocol 16, which makes provision for advisory opinions to be sought by courts in member states, could appear to support such a dialogic approach.²³

The discussion below suggests that the formal mechanisms introduced in June 2013 under new Protocols 15 and 16 ECHR (which are not yet in force) may in future play a role in enhancing subsidiarity or dialogic opportunities, although informal mechanisms already under development are also significant. There may be no necessary opposition between the two: formal and informal mechanisms may inter-react. By ‘informal mechanisms’ is merely meant mechanisms that may exist under the banner of the tags of ‘margin of appreciation’ or ‘the concept of subsidiarity’ but which need further delineation and definition, relying on the Strasbourg jurisprudence. O’Meara has argued recently that these changes under the two new Protocols will enhance dialogue.²⁴ It is suggested that that may well be the case, but it is also important to examine the existing factors that may impel the Court to listen to the domestic authorities.

While the provision in Protocol 15 is much less radical than the leaked proposals, it is possible that its effect, combined with the impact of the emphasis on subsidiarity from Interlaken and Izmir, has been to persuade the Court to rein itself in, to an extent not *formally* required under the provision itself. Express inclusion of the principles of subsidiarity and the margin of appreciation in the preamble, and urging the Court to give ‘great prominence’ to them, may appear to have a merely tokenistic or symbolic nature, but so doing sends a clear message to the Court about its role. The emphasis on subsidiarity in all three declarations and in Protocol 15 has arguably had an influence in the more recent cases in this context considered below, at times, however, arguably redolent more of an appeasement rather than a ‘dialogic’ approach. The growing emphasis on subsidiarity explains, it is contended, the less activist stance taken more recently by the Court. But the enterprise of ‘reform’ of the Strasbourg Court may have given way recently, in Autumn 2014 – especially bearing in mind, from the perspective of the Conservative leadership, the failure to push through more radical proposals at Brighton – to contemplation of a wholesale abandonment or curtailment of the ECHR project by Britain.²⁵ Obviously that possibility depends on the result of the General Election in 2015.

²² Point 12(c).

²³ See further N O’Meara ‘Advisory jurisdiction and the European Court of Human Rights: a magic bullet for dialogue and docket-control?’ (2014) 34(3) *Legal Studies* 444-468.

²⁴ See N O’Meara ‘Reforming the European Court of Human Rights through Dialogue? Progress on Protocols 15 and 16 ECHR’ UK Const. L. Blog (31st May 2013) (available at <http://ukconstitutionallaw.org>).

²⁵ See note 10. The removal of Dominic Grieve as Attorney-General in 2014 may indicate that Cameron wishes to create flexibility as to repeal of the HRA and as to the relationship between the UK and the Court after the 2015 election. See A Travis ‘Grieve, Clarke and Green were last protectors of our human rights laws’ *the Guardian*, 15th July 2014; see at <http://www.theguardian.com/law/2014/jul/15/grieve-clarke-green-human-rights-conservatives-europe>.

Ambit of Article 5(1): interactions between Strasbourg, the UK government and the domestic courts

The discussion proceeds to consider some examples of very significant decisions against the UK that have considered inter alia the ambit that should be accorded to Article 5(1), partly in the counter-terror context. The discussion is seeking to show that a change of stance is apparent when decisions from 2010 are compared with later ones, bearing in mind the growing emphasis on enhanced subsidiarity combined with a dialogic approach discussed.

In *A v. UK*²⁶ the government sought to argue, contrary to the conclusions of the House of Lords in *A and Others v. Secretary of State for the Home Dept.*,²⁷ that the derogation from Article 15 should be upheld, and in the alternative that the detention had not led to a breach of Article 5. In the derogation cases at Strasbourg the Court has usually accorded a wide margin of appreciation to the national authorities, and has therefore upheld the derogation, normally relating to use of executive detention, as in this instance.²⁸ But in finding under Article 15 that the measures taken (detention without trial for suspect non-nationals) were not strictly required by the exigencies of the situation, the Grand Chamber relied on the Lords' judgment in *A and Others*, finding that the domestic courts are part of the 'national authorities' to which the Court affords a wide margin of appreciation under Article 15: '...the Court considers that it would be justified in reaching a contrary conclusion only if satisfied that the national court had misinterpreted or misapplied Article 15 or the Court's jurisprudence under that Article or reached a conclusion which was manifestly unreasonable'.²⁹ In other words, the Grand Chamber could have upheld the derogation if the House of Lords had so long as the decision had been fully reasoned in reliance on ECHR. The Court proceeded to agree with the House of Lords on both the public emergency and proportionality issues under Article 15.

As regards Article 5, the government argued that the principle of fair balance underlies the whole Convention, and reasoned therefore that sub-para.(f) of Article 5(1) - the arguably applicable exception, allowing for detention pending deportation - had to be interpreted so as to strike a balance between the interests of the individual and the interests of the state in protecting its population from malevolent aliens. Detention, it was argued, struck that balance by advancing the legitimate aim of the state to secure the protection of the population without sacrificing the predominant interest of the alien to avoid being returned to a place where he faced torture or death.³⁰

In effect, in seeking to broaden the exception, the government sought to rely on a version of the argument that had been put on behalf of the Secretary of State in a number of the domestic control order cases,³¹ to the effect that the *purpose* of a measure - to ensure national security - should be taken into account in finding that it satisfied the demands of proportionality, and therefore it would fall outside the ambit of Article 5. Thus, the national

²⁶ (2009) 49 EHRR 29.

²⁷ (2004) UKHL 56.

²⁸ See eg *Brannigan and McBride v UK* (1994) 17 EHRR 539.

²⁹ (2009) 49 EHRR 29 at para 174.

³⁰ At para 148.

³¹ In particular, *SSHD v JJ* [2007] UKHL 45. See H Fenwick "Recalibrating ECHR Rights" (2010) 63 CLP 153-234.

security risk posed by an applicant should enable the ambit of Article 5 to be narrowed so that measures taken against the applicant commensurate with the risk he posed fell outside it. This was an argument that the Eminent Panel of Jurists³² in 2009 found that a number of governments have been seeking to use in the counter-terror context. The argument was that rights should be reinterpreted and recalibrated rather than derogated from, adopting a purposive approach – that the purpose of the measure in the national security context, should affect the ambit of the right. However, narrowing the ambit of Article 5(1) in *A v UK* would have tended to run contrary to the approach of the Court, in particular in the *Guzzardi* case,³³ which has been an activist as opposed to an originalist one, to the effect that Article 5(1)'s ambit should be extended so as to render Article 5 capable of covering (marked) non-paradigm interferences with liberty.

Rejecting the government's argument, the Court found that the Article 5 exceptions are exhaustive and to be narrowly interpreted: 'if detention does not fit within the confines of the [exceptions] as interpreted by the Court, it cannot be made to fit by an appeal to the need to balance the interests of the state against those of the detainee'.³⁴ Thus, the purpose of the detention – to counter terrorism – was not allowed to limit the ambit of Article 5 via the introduction of a new exception.

Similar arguments were also rejected in *Gillan v. UK*³⁵ in relation to Article 5. In the domestic decision in *R (Gillan) v Commissioner of Police for the Metropolis*,³⁶ on suspicion-less stop and search under s44 Terrorism Act 2000 (TA) Lord Bingham defended s44's breadth on the basis of its purpose: it ensured 'that a constable is not deterred from stopping and searching a person whom he does suspect as a potential terrorist by the fear that he could not show reasonable grounds for his suspicion'.³⁷ So the interference with the applicants' liberty was found to fall outside the ambit of Article 5, failing to amount to a *deprivation* of liberty. The Strasbourg Court found in contrast that suspicion-less stop and search under s44 TA had all the hall-marks of a deprivation of liberty, although it did *not* find a breach of Article 5, rejecting the government's argument that the *purpose* of the search should allow it to fall outside the ambit of the Article.³⁸

The Court then was again resistant in *Gillan* to executive arguments as to the need to maintain a narrow ambit of Article 5(1) in the terrorism context, and contemplated a higher standard as to the liberty of the subject than the House of Lords had done.³⁹ The refusal to find the breach under the non-materially qualified Article, however, maintains some leeway for states to introduce and maintain non-paradigmatic (and non-trial-based) coercive measures interfering with liberty.⁴⁰ But *A v. UK* and *Gillan* did indicate that Strasbourg was unreceptive to the conversion in effect of Article 5 into a right qualified further than by the

³² Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, 'Assessing Damage, Urging Action' (Geneva, ICJ, 2009).

³³ *Guzzardi v Italy* (1981) 3 EHRR 333.

³⁴ (2009) 49 EHRR 29 at para 171.

³⁵ (2010) 50 EHRR 45.

³⁶ [2006] 2 WLR 537.

³⁷ (2010) 50 EHRR 45 at para 35.

³⁸ *Ibid* at para 55.

³⁹ *Ibid* para 87. A breach of Article 8 was found on that basis. S44 was repealed under s59 Protection of Freedoms Act 2012

⁴⁰ The specific replacement for s44 in s61 Protection of Freedoms Act 2012, inserting s47A into the TA, is itself probably compliant with Article 5 under Art 5(1)(b): *R (Gillan) v Commissioner of Police for the Metropolis* [2006] 2 WLR 537 at [26] per Lord Bingham.

express exceptions on the Articles 8-11 model. In the counter-terror context, then, there has been reluctance to accept the argument that the ambit of Article 5 can be narrowed by reference to the notion that the purpose of a restriction should take it outside that ambit so long as the demands of proportionality are met. It may however be noted that in neither case were those specific arguments accepted domestically, since they were not put forward in *A* and were not examined in detail in *Gillan*. But outside the counter-terror context, and at a point when the pressure to show greater acceptance of subsidiarity was higher, the argument later received acceptance in the House of Lords, an acceptance that was then echoed at Strasbourg.

The decision in the House of Lords in *Austin v. The Commissioner of Police of the Metropolis*,⁴¹ found that ‘kettling’ peaceful protesters and bystanders for seven hours did not create a deprivation of liberty. Lord Hope in *Austin* considered that in making a determination as to the ambit of Article 5(1), the *purpose* of the interference with liberty could be viewed as relevant; if so, he found that it must be to enable a balance to be struck between what the restriction sought to achieve and the interests of the individual.⁴² Having found that purpose was relevant to the ambit given to Article 5(1), Lord Hope found that the purpose must take account of the rights of the individual as well as the interests of the community, and therefore any measures taken must be proportionate to the situation that made the measures necessary. If so such measures would fall outside Article 5(1).

When this decision was challenged at Strasbourg in *Austin v. UK*,⁴³ the Grand Chamber took a stance towards the deprivation of liberty question which in effect followed that of the House of Lords, finding:

‘the *context* in which action is taken is an important factor to be taken into account, since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good....If necessary to avert a real risk of serious injury or damage, and action is kept to the minimum required for that purpose, such action should not be described as ‘deprivations of liberty’.⁴⁴

Affirming that ‘subsidiarity is at the very basis of the Convention, stemming as it does from a joint reading of Articles 1 and 19’,⁴⁵ the Court found that, relying on the context of the imposition of the measure, the ‘kettle’, the *purpose* of its imposition, must be taken into account. Although the Court did not refer expressly to proportionality, it clearly adverted to that concept in finding that the measure taken appeared to be the ‘least intrusive and most effective means to be applied’.⁴⁶ On that basis no deprivation of liberty was found; in essentials, the Grand Chamber’s judgment did not differ from that of the House of Lords despite the fact that it ran counter to the findings in *A v. UK* on the interpretation of Article 5.

A strong joint dissenting opinion trenchantly criticised the findings of the majority as creating a new and objectionable proposition. It was found to be objectionable since if in the public order context liberty-depriving measures were deemed to lie outside Article 5 if claimed to be

⁴¹ [2009] 2 WLR 372; [2009] UKHL 5.

⁴² At [27].

⁴³ (App nos 39692/09, 40713/09 and 41008/09), judgment of 15th March 2012.

⁴⁴ At [59].

⁴⁵ At [61].

⁴⁶ At [66].

necessary for any legitimate/public-interest purpose, states could circumvent Article 5 for various reasons going beyond the exceptions.⁴⁷

Austin in effect creates a new, very broad, exception to Article 5, while purporting to avoid relating the public interest argument to the issue of ambit. The Grand Chamber reiterated, on the basis of the principle of subsidiarity, that it should interfere in a domestic decision as to facts only on very cogent grounds. But impliedly it went further: it applied that principle not to the findings of fact only, but to the *interpretation* of Article 5(1). So the Grand Chamber's stance would be in accordance with an expansive approach to subsidiarity as manifested in the Interlaken and Brighton declarations, and Protocol 15, not merely in relation to national law or fact-finding, but also in relation to interpretation of the Convention.

Superficially speaking, this interaction between the UK government, domestic courts and the Strasbourg Court could be seen to fall within a domestic dialogic model of rights protection and, on an international level, of a subsidiary model of such protection. The Strasbourg Court relied on the principle of subsidiarity to support the outcome of an interaction with the highest UK court and the UK government that resulted in creation of a restricted ambit for Article 5, based on proportionality arguments akin to those applicable under the materially qualified Articles, even in the face of the Strasbourg Court's own recent analogous decision. In reality the ideas of dialogue and of subsidiarity may be seen to be in tension, arguably veiling a capitulation to an appeasement approach in *Austin*. *Austin* may create some leeway to allow this purposive principle to make its way into the counter-terror context in respect of non-paradigm interferences with liberty via enhanced TPIMs⁴⁸ or ETPIMs⁴⁹ which already potentially tend to skirt or cross the boundaries of Article 5(1) tolerance.

There is a case for considering a new exception to Article 5 which could cover some non-paradigm interferences with liberty,⁵⁰ but it is argued that it should be considered openly in the Council of Europe, in the context of public order, and possibly terrorism, rather than being imported into Article 5 by stealth. Or, in the current situation in the UK in which the threat level has recently been raised to severe,⁵¹ a derogation from Article 5 should again be considered to cover the use of measures on the control orders model. The possibility of relying on Article 17 to create in effect a new exception to Article 5 against individuals or groups adhering to Salafism or Wahabism should also be considered, given that such groups are clearly of the type that Article 17 was designed to cover, given their extreme racist tendencies and intolerance of the exercise of a range of Convention rights, including religious freedom.⁵²

⁴⁷ Para 6 dissenting Opinion.

⁴⁸ As currently in contemplation by the government: see Cameron's speech on 1st September 2014, HC Deb Vol. 585, Cols 24-6, 01.09.14 in relation to the problem posed by returning fighters from Syria, and the recourse of relying on enhanced Terrorist Prevention and Investigation Measures (the proposed measures would go further than the current TPIMA 2011 measures, in particular by including a relocation requirement; see further H Fenwick, 'Designing ETPIMs around ECHR Review or Normalisation of "Preventive" Non-Trial-Based Executive Measures?' (2013) 76(5) *Modern Law Review* 876.

⁴⁹ Fenwick, *ibid*.

⁵⁰ See D Feldman 'Containment, deprivation of liberty and breach of the peace' (2009) 68(2) *Cam LJ* 243.

⁵¹ On 29th August 2014: see MI5 Press Release "Threat level to the UK from international terrorism raised to severe" <https://www.mi5.gov.uk/home/news/news-by-category/threat-level-updates/threat-level-to-the-uk-from-international-terrorism-raised-to-severe.html>.

⁵² See eg *Lesihideux v France* (App no 24662/94), judgment of 23rd September 1998; *Norwood v United Kingdom* (2005) 40 *EHRR* SE11 125; *Glimmerveen v the Netherlands* (App no 8348/78), judgment of 11th October 1979. Intolerance of religious freedom by such groups obviously includes intolerance of Judaism, of Shia Muslims, Christianity and Atheism (see eg 'Anjem Choudary: the British extremist who backs the

Reining in Article 3?

The argument accepted in *Ahmad and others v. UK*⁵³ on Article 3 in the counter-terror context, which had also been accepted domestically, showed some parallels with the one accepted in *Austin*. The government had intervened previously in order to argue in *Saadi*⁵⁴ that the risk of torture in the receiving country should be balanced against the risk to the community of the terrorist suspect's continued presence.⁵⁵ That argument was not accepted in that instance. But in *Ahmad*, the Court, without overtly accepting that balancing argument, in relation to Article 3, appeared to rely on the terrorist *context*⁵⁶ in finding that no breach of Article 3 would arise in extraditing the applicants to face the Super-max regime in the US – since it found that factors revealing a breach of Article 3 in a domestic context might not mean that a breach would arise in an expulsion context. That stance was somewhat redolent of the relativistic approach to Article 3 taken by the House of Lords in *Wellington*⁵⁷ even though the Court purported to reject the *Wellington* stance.⁵⁸

The UK government has for some time post 9/11 viewed itself as confronted by a dilemma in respect of persons who are suspected of being international terrorists but who cannot be removed from Britain, because there are grounds to think that they would be subject to forms of ill treatment in the receiving country which might violate certain Convention rights, in particular Article 3, following the principle stemming from *Chahal*.⁵⁹ The problem that poses for the government has to an extent been alleviated by the decision of the Strasbourg Court in *Othman v UK*.⁶⁰ For some time prior to that decision the government had sought to gain acceptance domestically and at Strasbourg for a balancing argument under Article 3, similar to the one discussed under Article 5 in relation to legal challenges to the attempts to extradite or deport a certain group of suspects. The idea was to achieve modification of the *Chahal* principle at Strasbourg, by arguing for the creation of a restrained ambit for Article 3.

As indicated, the government had intervened in order to argue in *Saadi*⁶¹ not only that the risk of torture should be balanced against the risk represented by the suspect,⁶² but that where there is evidence that he represents a national security risk, that should affect the standard of proof he has to adduce as to the likelihood of his being tortured: he should have to prove that it is more likely than not: 'if the respondent State adduced evidence that there was a threat to national security, stronger evidence had to be adduced to prove that the applicant would be at risk of ill-treatment in the receiving country...'.⁶³ Thus the government appeared to be

caliphate' *the Guardian* 7th September 2014; see at <http://www.theguardian.com/world/2014/sep/07/anjem-choudary-islamic-state-isis>).

⁵³ (2013) 56 EHRR 1.

⁵⁴ *Saadi v Italy* (App No 37201/06), judgment of 28th February 2008 at paras 117-123.

⁵⁵ Para 122: 'in cases concerning the threat created by international terrorism, the approach followed by the Court in *Chahal* ..had to be altered and clarified...the threat presented by the person to be deported must be a factor to be assessed in relation to the possibility and the nature of the potential ill-treatment.. [making] it possible...to weigh the rights secured to the applicant by Article 3 against those secured to all other members of the community by Article 2'.

⁵⁶ *Ahmad and others v UK* (2013) 56 EHRR 1, para 243.

⁵⁷ *R (On the Application of Wellington) (FC) (Appellant) v Secretary of State for the Home Department* (2008) UKHL 72.

⁵⁸ *Al-Skeini and Others v UK* (App no 55721/07) judgment of 7th July 2011, para 141.

⁵⁹ *Chahal v UK* (1996) 23 EHRR 413 paras 130-131.

⁶⁰ *Othman v UK* (2012) 55 EHRR 1.

⁶¹ At paras 117-123 of the judgment.

⁶² See note 55.

⁶³ Para 122.

seeking to justify deporting persons at risk of Article 3 treatment abroad on the basis of implying a proportionality test into Article 3. The Court found in response⁶⁴ that the UK's first argument was incompatible with the absolute nature of Article 3, and that its second argument for balancing the risk of harm if the person was sent back against the risk of harm to the community if not was misconceived: '...they are notions that can only be assessed independently of each other....Either the evidence that is adduced before the court reveals that there is a substantial risk if the person is sent back or it does not.'⁶⁵

The government's failure in *Saadi* meant that the issue that arose in the House of Lords in *RB, U, OO v. SSHD*⁶⁶ was of especial significance since the case had the potential to determine whether deportation of a particular group of suspects, and in particular of Abu Qatada, could occur. In the House of Lords the argument raised in *Saadi* was not re-raised; instead the case focused on the use of diplomatic assurances to reduce the risk of Article 3 treatment, and on the real risk of treatment of Qatada in flagrant breach of Article 6 in Jordan at his retrial there. SIAC had previously found that the assurances given in relation to Qatada, to the effect that he would not be subjected to Article 3 treatment, could be relied upon.

The key issue raised in the appeal on behalf of Qatada was to the effect that assurances in relation to individuals cannot be relied upon where there is a pattern of human rights violations in the receiving State, coupled with a culture of impunity for the State agents in the security service, and for the persons perpetrating such violations, and therefore SIAC's reliance on the diplomatic assurances that had been given against harm to Qatada in Jordan was irrational. In two claims against Russia the Strasbourg Court had spoken of the need for assurances to 'ensure adequate protection against the risk of ill-treatment' contrary to Article 3.⁶⁷ Lord Phillips also noted that in *Mamatkulov v. Turkey*⁶⁸ the assurances against ill-treatment were treated by the Court as part of the matrix that had to be considered when deciding whether there were substantial grounds for believing in the existence of a real risk of inhuman treatment. He further found that the Court had applied a similar approach in *Shamayev v. Georgia and Russia*,⁶⁹ and so, he pointed out, had the United Nations Committee Against Torture in *Hanan Attia v. Sweden*.⁷⁰ The political realities in Jordan, the bilateral diplomatic relationship with the UK, and the fact that Othman (Qatada) would have a high public profile, were, he found, the most significant factors in SIAC's assessment of the Article 3 risk, which disclosed no irrationality.

Lord Hope agreed, noting the UN position to the effect that in a regime systematically practicing torture, the principle of *non-refoulement* must be strictly observed and diplomatic assurances should not be resorted to.⁷¹ He however viewed that position as indicating that the question of reliance would always be a matter of fact, dependent on particular circumstances

⁶⁴ At paras 137-149.

⁶⁵ At para 139.

⁶⁶ *RB (Algeria) (FC) and another (Appellants) v SSHD OO (Jordan) (Original Respondent and Cross-appellant) v. SSHD (Original Appellant and Cross-respondent)* [2009] UKHL 10; on appeal from: [2007] EWCA Civ 808, [2008] EWCA Civ 290.

⁶⁷ *Ismoilov and others v Russia* (App no 2947/06) judgment of 12th December 2006, para 127 and *Ryabikin v Russia* (App no 8320/04) judgment of 19th June 2008, para 119.

⁶⁸ (2005) 41 EHRR 494. The court said that it was unable to conclude that substantial grounds existed for believing that the applicants faced a real risk of treatment proscribed by article 3: para 77.

⁶⁹ App no 36378/02, judgment of 12th April 2005.

⁷⁰ 17 November 2003, Communication No. 199/2002.

⁷¹ Cited in *Sing v Canada (Minister of Citizenship and Immigration)* 2007 FC 361, para 136, from UN Document A/59/324.

relating to the individual in question; he relied on the finding in *Saadi*⁷² to the effect that where evidence capable of proving that there are substantial grounds for believing that he would be exposed to ill-treatment is adduced by the applicant, it is for the government to dispel any doubts about it. Those doubts, SIAC had concluded, had been dispelled due to the assurances, and SIAC's assessment was found to be rational.

When the Lords' decision was challenged at Strasbourg in *Othman v. UK*⁷³ the Court's stance echoed that of the House of Lords as far as the Article 3 issue was concerned since it considered that only in rare cases would the general situation in a country mean that no weight at all would be given to assurances. It found that its only task was to examine whether the assurances obtained in a particular case were sufficient to remove any real risk of ill-treatment.⁷⁴ The Court found that on the evidence the Jordanian criminal justice system lacked many of the standard, internationally recognised safeguards to prevent torture and punish its perpetrators,⁷⁵ but that the assurances under the MOU that the applicant would not be ill-treated upon return to Jordan were superior to those that the Court had previously considered in both detail and formality.

They were found to have been given in good faith by the Jordanian government, at the highest levels of that government, and therefore capable of binding the state. The MOU was also found to be unique in that it had withstood the extensive examination that had been carried out by SIAC, which had had the benefit of receiving evidence adduced by both parties, including expert witnesses. The Court concluded on that basis that the applicant's return to Jordan would not expose him to a real risk of ill-treatment, meaning that no violation of Article 3 was found.⁷⁶ Thus, the argument as to the assurances accepted in the House of Lords also guided the Strasbourg decision.

That decision partially eased relations between Strasbourg and the UK government since it did provide the government with a way of addressing the dilemma posed by suspects such as Qatada as regards Article 3. The findings at Strasbourg were part of a dialogue with the domestic courts in the sense that the 'balancing approach' to Article 3 rejected in *Saadi* was not pursued domestically, and was replaced by the 'dispelling of doubts' approach that *Saadi* appeared to endorse, and which the House of Lords accepted. In turn the Court in *Othman* accepted that in principle that approach could be followed.

A 'balancing approach' under Article 6?

In the context of Article 6, *Al-Khawaja v UK*⁷⁷ also provides an example of an instance in which, where guidance from the domestic court was available, and where the consideration of the right in question was *fully embedded in the judgment*, the Court allowed itself to be guided towards a position in harmony with that taken by the national Court, even where that meant departing from its own previous judgment.⁷⁸ In *Al-Khawaja v UK*, as others have pointed out (for example Baroness Hale),⁷⁹ the Grand Chamber was guided by the Supreme

⁷² (2009) 49 EHRR 30, para 129.

⁷³ [2012] ECHR 56.

⁷⁴ Para 186.

⁷⁵ Para 191.

⁷⁶ Para 205.

⁷⁷ (2012) 54 EHRR 23.

⁷⁸ *Al-Khawaja v UK* (App no 26766/05) judgment of 20th January 2009.

⁷⁹ 'Argentoratium Locutum: Is Strasbourg or the Supreme Court Supreme?' (2012) 12(1) HRLR 65-78.

Court in *R v Horncastle*⁸⁰ in reaching the decision on the scope of Article 6, which was contrary to its decision in the Chamber on the issue.⁸¹ The approach at the domestic level took a more pragmatic, less absolutist, approach to Article 6 requirements than the Court had previously done, and the Grand Chamber then accepted that approach, which gave greater weight to the interests of victims of crime.

Its stance can be characterised as an approach that looked at the fairness of the proceedings as a whole in relation to defence as well as victim, under Article 6, rather than demanding an absolutist application of a particular rule of evidence, regardless of overall fairness. The Grand Chamber found: “It would not be correct, when reviewing questions of fairness, to apply [the rule in question] in an inflexible manner....To do so would transform the rule into a blunt and indiscriminate instrument that runs counter to the traditional way in which the Court approaches the issue of the overall fairness of the proceedings, namely to weigh in the balance the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice”.⁸² The Grand Chamber concluded: ‘viewing the fairness of the proceedings as a whole, the Court considers that, notwithstanding the difficulties caused to the defence by admitting the statement and the dangers of doing so, there were sufficient counterbalancing factors to conclude that the admission in evidence of ST’s statement did not result in a breach of Article 6(1) read in conjunction with Article 6(3)(d) of the Convention’.⁸³

Those findings as to Article 6 can be contrasted with the findings in the somewhat earlier decision in *A v UK* on minimum disclosure of material forming the grounds for suspicion against terror suspects in non-trial based proceedings. The previous House of Lords’ decision in *MB*⁸⁴ had taken an approach that paid attention to the fairness of the proceedings as a whole. Baroness Hale said: with ‘strenuous efforts from all’, it should usually be possible to accord the controlled person ‘a substantial measure of procedural justice’.⁸⁵ Thus she stopped short of saying that where the detail lay in the closed case, and it remained wholly undisclosed, a fair hearing would be precluded. The Grand Chamber in *A* in contrast found that regardless of the possibility that the proceedings as a whole could be viewed as fair, an absolute rule as to minimum disclosure must be upheld. It was clear that the Grand Chamber’s stance differed from that of the Lords in *MB* in that the majority in the Lords had sought to ensure that a substantial measure of procedural justice could be ensured even where *all* the details of the case were in the closed material, whereas the Grand Chamber considered that even where *full* disclosure did not occur a *degree* of disclosure was essential.⁸⁶ The Court found that although a balance could be struck between national security demands and fair process, the national security interest could not demand that *no* disclosure of the basis for suspicion need occur. The more pragmatic, balancing approach in *MB*, characteristic of common law reasoning, was rejected.⁸⁷

⁸⁰ [2010] 2 WLR 47.

⁸¹ *Al-Khawaja v UK* (2012) 54 EHRR 23.

⁸² At para 146.

⁸³ At para 158.

⁸⁴ *Secretary of State for the Home Department v MB* [2008] 1 AC 440.

⁸⁵ At [66]. She also said: ‘I do not think that we can be confident that Strasbourg would hold that every control order hearing in which the special advocate procedure had been used, as contemplated by the 2005 Act and Part 76 of the Civil Procedure Rules, would be sufficient to comply with article 6’.

⁸⁶ At para 220.

⁸⁷ See further H Fenwick ‘Recalibrating ECHR Rights, and The Role of The Human Rights Act Post 9/11: Reasserting International Human Rights Norms in the “War On Terror”?’ (2010) 63 CLP 153-234.

The decision in *Othman v. UK*⁸⁸ as regards the Article 6 issue, also appears to stand in contrast to *Al-Khawaja v UK*. At the domestic level SIAC had found that there was a real risk that confessions would be relied on in Othman's retrial in Jordan which had been obtained by treatment that breached Article 3, but their admission would be the consequence of a judicial decision, within a system at least on its face intended to exclude evidence which was not given voluntarily.⁸⁹ So SIAC had found no likelihood of a total denial of the right to a fair trial under Article 6, but the Court of Appeal then went on to find that SIAC had erred in law: 'The use of evidence obtained by torture is prohibited in Convention law...because of the connexion of the issue with article 3, a fundamental, unconditional and non-derogable prohibition....SIAC was wrong not to recognise this crucial difference between breaches of article 6 based on this ground and breaches of article 6 based simply on defects in the trial process or ...composition of the court'.⁹⁰

In the House of Lords Lord Phillips did not accept the conclusion of the Court of Appeal⁹¹ that it required a high degree of assurance that evidence obtained by torture would not be used in the proceedings in Jordan before it would be lawful to deport Othman to face those proceedings. He found that the principle at issue was that the 'state must stand firm against the conduct that has produced the evidence, but that that did not require a different state to retain to the detriment of national security a terrorist suspect absent a high degree of assurance that evidence obtained by torture would not be adduced in the receiving state.'⁹²

The Strasbourg Court in *Othman* agreed with the Court of Appeal rather than the House of Lords. The Court found that the admission of torture-tainted evidence would be manifestly contrary, not just to the provisions of Article 6, but to the most basic international standards of a fair trial.⁹³ Having made that finding, the remaining two issues which the Court had to consider were: (i) whether showing a real risk of the admission of torture evidence would be sufficient; and (ii) if so, whether a flagrant denial of justice (a breach so fundamental as to amount to a nullification of the very essence of the right guaranteed by Article 6) would arise in this case.⁹⁴ The Court found that on any retrial of the applicant, it would undoubtedly be open to him to challenge the admissibility of statements made against him, alleged to have been obtained by torture. But the difficulties he would face in trying to do so many years after the event, and before the same court which had already rejected a claim of inadmissibility (and which routinely rejected all such claims), were very substantial indeed.⁹⁵

The Court therefore concluded that the applicant had discharged the burden that could be fairly imposed on him of establishing that the evidence that could be used against him was obtained by torture. So the Court, in agreement with the Court of Appeal, found that there was a real risk that the applicant's retrial would amount to a flagrant denial of justice, and therefore that his deportation to Jordan would create a breach of Article 6.⁹⁶ Thus, the

⁸⁸ [2012] ECHR 56.

⁸⁹ At para 422 of SIAC's judgment.

⁹⁰ Paras 45, 49, Court of Appeal judgment.

⁹¹ At para 154. See further M Garrod 'Deportation of Suspected Terrorists with "Real Risk" of Torture: The House of Lords Decision in *Abu Qatada*' (2010) 73 MLR 631

⁹² At para 153.

⁹³ Para 267.

⁹⁴ Para 271.

⁹⁵ Para 279.

⁹⁶ Paras 280, 282.

decision on the Article 6 question took a strict stance⁹⁷ since it meant that the prospective use of evidence obtained by torture would *automatically* constitute a flagrant denial of justice in a foreign state, regardless of other safeguards or of its importance to the outcome of the trial.⁹⁸ That finding can be reconciled with its finding on the Article 3 issue. If assurances could be relied on to dispel concerns as to the use of torture in the receiving state, then the same would apply to an agreement capable of mitigating the risk that evidence obtained by torture might be relied on. Jordan did in fact agree that torture-tainted evidence used in Qatada's previous trial would not be used in the retrial and it may be noted that Qatada was eventually acquitted in Jordan of the charges against him.⁹⁹ Thus safeguards available in the national legal system in the receiving country, or able to be agreed upon before a deportation, against admitting or relying on torture-tainted evidence, and the likelihood of their being determinative in the particular case, should be given weight. Thus, the deportation or extradition of terrorist suspects to countries such as Jordan that have used torture, and have allowed such evidence to be admitted in criminal trials, can be undertaken, so long as the relevant assurances are forthcoming.

The two strands of the decision in *Othman* – as to Article 3 and Article 6 - indicate, it is contended, that the Court is not prepared to accept an overt balancing approach within the absolute or non-materially qualified rights, in relation to the possible use of torture, even where that approach has been accepted in the highest domestic court, which has also rehearsed the Convention arguments fully. Thus in so far as the House of Lords' approach on the Article 6 issue relied on taking account of the risk to national security represented by the applicant, the Court was unreceptive to that approach. But outside the Article 3-linked context, the Court has shown itself to be prepared to be guided by the domestic court towards a balancing approach under Article 6, as *Al-Khawaja* demonstrates.

Conclusions

This chapter has sought to suggest that a growing acceptance of a doctrine of enhanced subsidiarity is evident in certain of the recent Strasbourg judgments in the sense that a range of findings of the British domestic courts are arguably being given greater weight at Strasbourg in the context of the Izmir, Interlaken and Brighton declarations and Protocol 15 – *if* the Convention right has been considered fully by the domestic court. The UK courts have shown a degree of acceptance for a balancing approach, especially under Articles 5 and 3, which it is argued has then also found some purchase in the more recent Strasbourg judgments under the guise of paying attention to the 'context'. So long as the domestic courts fully rehearse the Convention arguments, as Lord Bingham failed to do in *Gillan*, the Court is currently showing some reluctance to depart from their findings.

⁹⁷ See on the Article 6 issue *Gafgen v Germany* [2011] 52 EHRR 1 and *El-Haski v Belgium* (App no 649/08), judgment of 25th September 2012; in *Gafgen* it was found that the risk of admission of such evidence was not viewed as *automatically* creating a flagrant denial of justice, but as raising serious issues as to the fairness of the proceedings.

⁹⁸ Note: after this decision, in *Othman v SSHD* [2012] UKSIAC 15/2005_2 (12.11.2012) SIAC found that the Secretary of State should not have declined to revoke the deportation order, because she had not satisfied the judges that, on a retrial in Jordan, there would be no real risk that the impugned statements apparently obtained by torture would be admitted.

⁹⁹ See S Malik 'Abu Qatada cleared of terror charges by Jordan court and released from jail' *the Guardian* 24th September 2014; see at <http://www.theguardian.com/world/2014/sep/24/abu-qatada-cleared-terror-charges-jordan-court>.

The conclusion of this piece is that the mechanisms for dialogue and subsidiarity are already present – but that the UK government and the Court need to learn to operate them more transparently, effectively and sensitively. Protocol 15 does not add very much, it is suggested, to that process in *formal* terms, but although it is not yet in force may be aiding in impelling the Court to take a more cautious approach to sensitive issues of the type discussed, and to paying greater attention to consistency in its operation of the margin of appreciation doctrine (a sensitivity which was absent in *Hirst*). The domestic courts appear to recognise that the UK's margin of appreciation is more likely to be triggered in respect of a particular decision if a full balancing analysis has occurred. Protocol 16 might be of some value in future in allowing the Court to talk to the Supreme Court at an earlier stage in potential conflicts, and so to furthering such an analysis.

The use of dialogue between the domestic courts and Strasbourg is of value in terms of avoiding derailment of the whole ECHR project. But this chapter argues that full awareness of the implications of such dialogue is necessary. It is concluded that a Strasbourg approach that appears to accord subsidiarity and the dialogic approach an enhanced role has at times obscured its appeasement effects. It may also be questioned whether a dialogic approach is fully consonant with maintaining subsidiarity. If as discussed domestic courts are more receptive to state arguments as to a balancing approach based on the purpose of a measure, as in *Austin*, and *Wellington* then those arguments may be able to gain some unacknowledged purchase at the international level.

With a view to its own future, and the project of maintaining a degree of rights' protection, especially in the counter-terror arena, the Court may therefore be relying on subsidiarity and a dialogic approach to seek to distance itself from the image it has, in an increasingly nationalistic Europe and in the eyes of the Conservative leadership - that of a quasi-Constitutional, over-activist institution. At the present time, that stance may be wise. The consensus that marked the inception of the ECHR, and has grown and extended its influence since, may be in danger of unravelling at the present time. But clearly, if this is appeasement, it has not gone far enough yet in populist terms, and the question of seeking to satisfy the Conservative leadership and sections of the public that the Court is not encroaching too far on British autonomy is likely to remain a politically forensic one in the build-up to the 2015 General Election.